



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 203 OF 2012

RANDOLPH TINDIKA t/a TINDIKA & CO. ADVOCATES....APPLICANT

VERSUS

LUKA MWAMBAGA MSAGHA..... RESPONDENT

RULING

1. The applicant filed an application by way of chamber summons on 18th February, 2016 under paragraph 11(2) of the Advocates (Remuneration) Order. He moved this court to:-

(i) Hear and determine his objection to the decision of the Taxing Officer in that:-

(a) The Learned Taxing Officer erred in law and in fact in taxing items 1, 3, 34, 35 and 39 of the applicant's/Advocate's Advocate/Client Bill of Costs dated 18th June, 2012 and in taxing off the total amounts claimed under all the said items;

(b) The Learned Taxing Officer erred in law and in fact in declining and/or refusing to find that the instructions went beyond the scope of handling the conveyance and involved sourcing for buyers for the property herein and in disregarding the submissions of the applicant wholly on the said issue yet taking into account the submissions of the Respondent's Advocates from the bar without any documentary or other supporting evidence thereof;

(c) There were errors in principle in the Taxing Officer's ruling and/or reasoning;

(d) The Learned Taxing Officer erred in failing to give any or any proper reasons for taxing off the said items No. 1, 3, 34, 35 and 39 of the applicant's said Bill;

(ii) Consider/assess the Advocate/Client Bill of costs dated 18th June, 2012 and;

(a) Set aside the Taxing Officer's decision on taxing off items No. 1, 3, 34, 35 and 39 in the said Bill and;

(b) Assess the fees payable on the said items No. 1, 3, 34, 35 and 39 at such sums as the justice of the case would require bearing in mind the value of subject matter herein and the work done by the applicant.

(iii) That the respondent be ordered to pay the costs of the reference.

The application is supported by the grounds on the face of it and the supporting affidavit of the applicant filed on 18th February, 2016 and a supplementary affidavit filed on 12th July, 2016.

2. The respondent in opposing the application filed a replying affidavit on 11th May, 2016 and a further affidavit on 14th September, 2016. The applicant filed his written submissions on 1st September, 2016 and the respondent's Counsel filed his on 14th September, 2016.

APPLICANT'S SUBMISSIONS

3. The applicant, Mr. Tindika Advocate who appeared in person submitted that the decision of the Taxing Officer was made on 11th November, 2015 and that the applicant served a notice of objection on 18th November, 2015 at the registry. The applicant wrote another letter which was received on 22nd January, 2016 and as such he was within the 14 days required by the provisions of paragraph 11(2) of the Advocates (Remuneration) Order.

4. The applicant submitted that he received a response from the Deputy Registrar on 28th January, 2016 and that he proceeded to file an objection in this matter. He objected to the taxing of item No. 1 on the Bill of costs, being the instruction fees. The applicant informed the court that his instructions extended to sourcing for buyers for the sale of land and removal of squatters from the said land. He engaged the said squatters in discussions but did not succeed in this as instructions were withdrawn. The applicant also stated that he attended several meetings to negotiate the sale with one of the Directors of the purchaser of the said land. It was further submitted that the applicant represented the respondent while the firm of A.B. Patel & Patel at the first instance represented the purchaser but thereafter the firm of Inamdar & Inamdar took over the sale transaction. The applicant submitted that there was an agreement between him and the respondent with regard to the issue of getting the squatters out of the land that was being sold. Kshs. 1.5 Million was paid as deposit and Kshs. 13.5 Million was paid after the transfer. The balance of Kshs. 3.5 Million was to be paid after removal of the squatters from the property. He prayed for item No. 1 of the bill of costs to be taxed as drawn or for a reasonable amount to be awarded.

5. On item No. 3 of the Bill of costs, the applicant claimed Kshs. 30,000/= for the meetings he attended on behalf of the respondent. He submitted that items No. 34, 35 and 39 are with regard to instructions of negotiating with the squatters on the said land. The applicant informed the court that a Bill of Costs can be interfered with if taxation was too high or manifestly too low. In his view, he was denied fees for the work he did for the respondent especially on item No.1 of the Bill of Costs. The applicant asserted that he paid the respondent Kshs. 11,663,630.00 out of Kshs. 14,280,000.00/= and he believes that the balance is his fees payable by the respondent.

6. The applicant attached to his affidavit, copies of the ruling on the taxation of the Advocate's/Client Bill of costs and correspondence addressed to the Deputy Registrar dated 17th November, 2015 and 15th January, 2016 as well as the Deputy Registrar's response dated 26th January, 2016. Mr. Tindika cited various authorities in his written submissions to buttress his application.

RESPONDENT'S SUBMISSIONS

7. Mr. Mwaniki, Learned Counsel for the respondent submitted that the reference herein was filed outside the stipulated time, without leave of the court and prayed that it be struck out. He submitted that in accordance with paragraph 11(2) of the Advocates (Remuneration) Order, the reference ought to have been filed on 10th February, 2016. He informed the court that the Deputy Registrar responded to the applicant's letter on 26th January, 2016. In his view, the Deputy Registrar addressed himself fully on the notice by the applicant.

8. Counsel further submitted that the applicant produced no licence to show that he is a Commission

Agent and no letter was produced to show that he had been specifically instructed to source for buyers and to negotiate with squatters to move out of the property that was being purchased. The Deputy Registrar held that the applicant was entitled to Kshs. 1,731,935.50. Counsel submitted that he had attached a copy of a bank transfer to the respondent's affidavit to show that the respondent received Kshs. 10,045,083.00. It was therefore not true that the respondent had received more than the said amount. Counsel disputed the issue of stamp duty being paid by the applicant on behalf of the respondent as according to Mr. Mwaniki, the applicant did not avail documentation to show that he was instructed to pay stamp duty by the respondent.

9. He submitted that no meetings were held between the applicant and the purchaser. Counsel requested the court to order the applicant to deposit Kshs. 3,268,065.00 in court being the outstanding amount due to the respondent, in the event that the reference is allowed. The respondent also relied on the affidavits he filed and annexures thereto.

APPLICANT'S RESPONSE

10. Mr. Tindika responded by stating that instructions from the respondent were verbal and that the Taxing Officer's ruling was against the provisions of paragraph 27 of the Advocates (Remuneration) Order and that he was entitled to a commission for getting a purchaser. He submitted that an amount of Kshs. 925,000/= was taxed off and an amount of over Kshs. 1 Million went to disbursement. In his opinion, the request that he deposits in court the sum of Kshs. 3,268,065.00 was far fetched.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If the reference to this court was filed within the required timeline;

(ii) If the Taxing Officer erred in taxing off items No. 1, 3, 34, 35 and 39 in the Bill of Costs dated 18th June, 2012.

11. With regard to the period set for filing of a reference to the High Court against the ruling of a Taxing Officer, the provisions of paragraph 11(1) and (2) of the Advocates (Remuneration) Order, 2009 are applicable. They provide as follows:-

“11(1) should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.”

11(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons, which shall be served on all parties concerned, setting out the grounds of his objection.”

12. The applicant's supporting affidavit shows that he raised his objection with the Deputy Registrar, Mombasa High Court through a letter dated 17th November, 2015 attached to the said affidavit and marked as RMT 2. This was followed by the reminder marked as RMT 3 dated 15th January, 2016. The Deputy Registrar through a letter dated 26th January, 2016 responded to the applicant's letter and informed him that the reasons for the taxation were in her ruling.

13. The applicant in paragraph 4 of his affidavit deposes that he received a letter from the Taxing Officer on 28th January, 2016 pursuant to the provisions of paragraph 11(2) of the Advocates (Remuneration) Order. It therefore follows that pursuant to the said provisions, time for filing a reference to this court started to run from the 28th January, 2016. The applicant had fourteen (14) days to file a reference from the said date. He filed the reference on 18th February, 2016. This outrightly put the filing of his reference

outside the time span of fourteen (14) days provided under paragraph 11(2) of the Advocates (Remuneration) Order, 2009. I am in agreement with Counsel for the respondent that the reference should have been filed by 10th February, 2016. Although the applicant had recourse to the provisions of paragraph 11(4) of the Advocates (Remuneration) Order 2009 which provide for enlargement of time, he opted not to follow that avenue thus falling afoul of the law.

14. The court in the case of **N.W Amolo T/a Amolo Kibanya & Co. Advocates vs Samson Keengu Nyamweya** [2016] eKLR held that a reference that was filed outside the fourteen (14) days stipulated in the Advocates (Remuneration) Order was incurably and fatally incompetent.

15. In similar vein, having found that the reference herein was filed outside the time allowed, I find that the application is incompetent. Having found so, I will not delve into the merits or demerits of issue No. (ii), on whether the Deputy Registrar was correct in taxing off items No. 1, 3, 34, 35 and 39 in the Bill of Costs dated 18th June, 2012. I hereby strike out the reference herein. Costs of the reference are awarded to the respondent.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of January, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Gathuku holding brief for Mr. Mwaniki for the respondent

No appearance for the applicant

Oliver Musundi Court Assistant